United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: April 11, 1996

TO : Rochelle Kentov, Regional Director

Region 12

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice 177-2401-9000

506-4033-5000

SUBJECT: Arlington Electric 506-4067-9500

Case 12-CA-17156 524-5073-2200

This 8(a)(1) and (3) charge was submitted for advice on the issue of whether a paid Union organizer/employee engaged in unprotected activity by distributing handbills at his Employer's jobsite which informed employees of job opportunities available through the Union and handbills asking patrons of a hospital adjoining and associated with his Employer's jobsite not to use said hospital because his Employer does not provide its employees with paid health care for their families.

FACTS

The Employer is an electrical subcontractor based in Stuart, Florida which regularly does work down in Broward County, Florida. The instant charge relates to the Employer's work at a stand-alone rehabilitation building in Hollywood (Broward County), Florida, which rehabilitation center is being built by its neighbor, Memorial Hospital. The Employer has been hired as the electrical subcontractor by general contractor Centex-Rogers to install the electrical systems at the rehabilitation center.

David Svetlick, the alleged discriminatee, is an organizer for the International Brotherhood of Electrical Workers, AFL-CIO, hereinafter referred to as the Union. The Employer hired Svetlick on or about November 29, 1994 to work on the rehabilitation center project. Svetlick did not indicate on his application for employment, nor did he volunteer at his interview, that he was a union organizer. He, likewise, did not indicate that he had worked on union jobs. He did not state that he had gone through the IBEW apprenticeship program nor did he wear any union paraphernalia until about his second week on the job.

The Employer's work complement at the rehabilitation center project fluctuated between 5 and 6 workers throughout Svetlick's time with the Employer in accordance with the

demands of the project and those of other ongoing projects. On or about December 2, 1994, Foreman Jack Briggs distributed a leaflet at the worksite announcing that the Employer would pay a \$50 finder fee per electrician referred to the Employer who was eventually hired by the Employer. Svetlick referred two employees who were hired on December 5.

On or about December 7, Svetlick struck up a conversation with two union carpenters on the job. [FOIA Exemptions 6 and 7(c)]had general conversation about unions during lunch and break periods. All the electricians were present there. [FOIA Exemptions 6 and 7(c)] talked about how unions work, dues, and how much work they had. Everyone participated. [FOIA Exemptions 6 and 7(c)

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On December 8, Svetlick was working with employees Tony Mathis and Mike Omerin. Svetlick suggested that they should all form an employees' association, and that Mathis should be their President. Mathis then responded that Svetlick should be their President to which Svetlick answered that he would gladly be their President and that he would get them all raises.

On December 9, Svetlick was working with temporary employee Kersey Noailles. Svetlick talked to Noailles about the possibility of joining the Union and Noailles asked Svetlick if he was "union." Svetlick said that he was and that the Union would be interested in having Noailles as a member, too. Noailles said that he would stop at the Union office one afternoon to see about joining. Later that same day Svetlick talked with journeyman and "fill-in foreman" Medine about unions. Svetlick told Medine about the benefits unions could get and that they treat people pretty well.

On December 12, Svetlick wore a Union hat and shirt with a Union pencil clip to work. Medine asked Svetlick if he was union and Svetlick responded that he was. Medine then told Svetlick that he thought so, and the two spoke about the Union for most of the day. [FOIA Exemptions 6 and 7(c)] Medine expressed an interest in what it cost to join, what the dues were like, and what benefit package the Union offered. [FOIA Exemptions 6 and 7(c)] Medine told him that he wasn't ready to join just yet but he might be if the Employer didn't get anything else down south.

The next day, December 13, Medine was filling in as foreman. That afternoon, at lunch time, Svetlick distributed to the other employees on the jobsite a handout which read:

"Attention"
Electricians
IBEW LU 728 is in need of your services
for employment with our union contractors.
\$15.60 per hour
plus benefit package
Call John Ranken or David Svetlick
Organizers (305)525-3106
All inquiries will be kept confidential.

Later that day, Foreman Briggs asked Svetlick if his was the name appearing on the handbill and Svetlick said that it was. Briggs asked how it was that the Union allowed him to work nonunion. Svetlick explained that it was his job to educate the nonunion employees about the benefits of being union.

On December 18, Union organizers Ranken and Svetlick spoke at the local and decided that they would distribute handbills at Memorial Hospital informing patrons of the hospital that Arlington Electric did not provide health care coverage for its employees' families. On December 19, Svetlick and Ranken handbilled the hospital with handbills saying:

Please Do Not Use
This Hospital

Arlington Electric, My Employer, Has
No Paid Health Care for My Family.
Thank You
Arlington Electric Employees.

Later that afternoon, Briggs confronted Svetlick and asked him why he was spreading lies about the company. Svetlick responded that he was not spreading lies and that Briggs should read the language of the handbill more closely. [FOIA Exemptions 6 and 7(c)] the handbill is truthful because the Employer's Personnel Manual does not indicate that the health care coverage provided for dependents of employees is paid for by the Employer.¹

 $^{^{1}}$ Although the Employer pays for health care coverage for its employees, the employees apparently have to pay for the

After Briggs stormed off, Medine, who was filling in as foreman, approached Svetlick and told him that he wouldn't be long on the job and that he would probably be fired. The next day Svetlick, again during his lunch hour, distributed the handbills to patrons of the hospital, and also placed copies of the handbill on the cars of employees of the general contractor, Centex-Rogers.

On December 21, Briggs and Arlington Electric's owner, James Williams, came to the jobsite and watched Svetlick work for one-half hour. Williams then introduced himself to Svetlick and gave him a \$100 check for having referred the two employees to the company earlier in the month. He also handed Svetlick a termination slip and with that fired Svetlick.

ACTION

In agreement with the Region, we concluded that, absent settlement, complaint should issue alleging Svetlick's discharge to be violative of Section 8(a)(3) and (1) of the Act because his distribution of the two different handbills was protected activity.

Clearly, based on the evidence in the file, Svetlick was attempting to organize the Employer's employees. As such he was engaged in protected activities under the Act and was entitled, notwithstanding that he was apparently being paid by the Union for his activities, to the full protections of Section 7. National Labor Relations Board v. Town & Country Electric, Inc., et al., U.S., November 28, 1995. It is clear that Svetlick was engaging in union activity when he passed out the two leaflets which are at issue in this case. The issue here is whether distributing those particular leaflets constituted protected activity.

We have concluded that Svetlick's distribution of the two leaflets was protected. Thus, with respect to the "work opportunity" leaflet, that leaflet served to notify employees that Union contract wages are higher than those paid by the Employer and that the Union was trying to organize the Employer so that it would pay those wages. This message was clearly a protected one. Further, as noted by the Region, informing fellow employees of possible job opportunities with other employers does not divest that

coverage for their dependents under the Employer's health care plan.

employee's otherwise protected concerted activities of their protected status, as long as those activities are engaged in for the purpose of broadening the employees' employment opportunities and not for the purpose of inducing employees to sever their employment relationship with their Employer. Technicolor Government Services, 276 NLRB 383, 388 (1985). Moreover, an employee who engages in union or other concerted activity in furtherance of employees' mutual aid or protection does not lose his protection under the Act simply because those activities may have the effect of causing some employees to resign their employment with the Employer. Boeing Airplane Company, 110 NLRB 147, 151 (1954), enf. denied, 238 F. 2d 188 (9th Cir. 1956).

On the other hand, the Employer contends that the distribution of the "work opportunity" leaflet was an act of employee disloyalty, citing NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Broadcasting), 346 U.S. 464, 74 S.Ct. 172 (1951). It further cites Technicolor Government Services, supra, and Boeing Airplane Co. v. NLRB, 238 F. 2d 188, 193 (9th Cir. 1956) for the proposition that "it has long been recognized that where the purpose of an employee's action is to cause the permanent severance of the employment relationship between the employer and the other employees, and not to protect those employees against possible unemployment, the action falls outside the scope of section 7's protection." In this regard the Employer contends that Svetlick's distribution of this leaflet was an attempt on his part to induce his coworkers to leave their positions with the Employer. The Employer even asserts that several of those coworkers "understood" that Svetlick's purpose was to induce them to leave their jobs with the Employer.² The Employer also maintains that Svetlick could not have been motivated by a desire to protect his coworkers from unemployment since he was allegedly "well aware that there was virtually no risk that Arlington would reduce the size of its workforce for lack of work." The Employer further argues that this position is bolstered by the asserted fact that the company is "prosperous" with a "growing demand for qualified electricians" and that Svetlick knew this because he himself had responded to the Employer's offer to pay a \$50 finders fee for each electrician referred to it that the Employer hired. Thus, the Employer's contention goes, Svetlick's distribution of the "work opportunity" leaflets "could not have been motivated by a desire to protect himself and his coworkers against the risk that they would

 $^{^{2}}$ The Employer offered no such evidence by way of testimony.

be released by Arlington for lack of work" and his "distribution of those flyers is therefore not protected by section 7."

First of all, the Employer's reliance on Jefferson Broadcasting, Technicolor and Boeing misses the mark. The Jefferson Broadcasting case, while standing for the general proposition that certain employee activities designed to injure their Employer's business will be found to be without protection of the Act, specifically had to do with product disparagement to the public and did not concern the issue of informing employees of jobs elsewhere. As noted above, in Technicolor, the Board found protected a steward's distribution of job applications to the employer's employees for work at another company which was competing with the employer in the upcoming rebidding of a government contract. The ALJ, whose opinion was adopted by the Board, pointed out that the union intended only to protect the job opportunities of the employees if their employer was unsuccessful in the rebidding process, and that the activity was not designed to and did not in fact undermine the competitive advantage of the employer.

Also, the Board's holding in <u>Boeing</u>, supra, further supports the proposition that where an employee engages in activity intended to broaden the employment opportunities of fellow employees without soliciting their resignations or otherwise seeking to injure the employer, such activities are protected as being in furtherance of employee mutual aid and protection. In <u>Boeing</u>, the Board held that an employee who had participated in the arrangement of a conference at which employees of his Employer would be introduced to, and interviewed by, other employers in the same industry had not engaged in unprotected activity where the Union, on whose behalf the employee was acting, intended only to educate employees as to their employment options elsewhere and to thereby strengthen their hand in the pending negotiations with the Employer.

Finally, the Ninth Circuit's decision in which it reversed the Board's decision in <u>Boeing</u> and found the employee's activity unprotected is distinguishable from the situation where, as here, an employee merely informed other employees that there were higher paying employment opportunities with union contractors. Thus, the court's decision in <u>Boeing</u> was based on the employee's actually serving, on behalf of the union, as a licensed employment agent to get employees jobs with other employers and the union's disclaimer of any intention to engage in

negotiations with the employer, which the employment efforts could have strengthened. In the instant case, as a union organizer, Svetlick was educating the employees of the options available to them outside of Arlington Electric and strengthening the Union's hand in its organizing campaign. One of the biggest hurdles, if not the biggest, in organizing the unorganized is overcoming the fear that most employees have of losing their jobs if the Employer becomes aware of their pro-union sympathies and fires them. One way to surmount this hurdle is to educate the employees that if that happens, there are jobs, even better jobs, available through the Union's hiring hall. [FOIA Exemptions 6 and 7(c)

], perhaps this was his intent in informing his fellow employees of these job opportunities—to tell these employees initially that they need not fear the Employer's retribution since there were even better jobs available through the Union. 3

Moreover, as the ALJ pointed out in <u>Technicolor</u>, the mere fact that concerted activity looks toward employment by another employer does not rob that activity of Section 7 protection. Thus in <u>QIC Corp.</u>, 212 NLRB 63, 68 (1974), the Board adopted an ALJ decision that a group of employees filing applications with a competitor employer did not constitute "disloyalty" sufficient to render such conduct unprotected under Section 7 of the Act.

In any event, Svetlick's actions in passing out the "work opportunity" leaflet did not even go this far. Thus, while the Employer asserts that distributing the leaflet was an attempt to induce employees to leave their positions with Arlington Electric, manifestly, the leaflet makes no such

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³ The arguments set forth in this memorandum regarding what may have been Svetlick's intent in distributing the "work opportunity" leaflet constitute reasonable inferences which can be drawn from the leaflet. [FOIA Exemptions 2 and 5]

urging. For all we know, the Union may have been able to refer these employees to some part-time or "moonlighting" jobs which would not conflict with the times they were working for the Employer, and thus would not require their resignation from Arlington Electric. Additionally, the leaflet does not urge employees to quit but simply informs them of opportunities that are available. Since they are, after all, employed in the construction industry which is traditionally marked by seasonal breaks in employment, there might be times of layoff when knowledge of employment opportunities through the Union would come in handy for these employees.

The Employer contends that "Svetlick was well aware that there was virtually no risk that Arlington would reduce the size of its workforce for lack of work." The Employer even points to Svetlick's referral of two employees to the Employer in response to the finder's fee leaflet. However, just because the Employer offered a finder's fee in December doesn't mean that there couldn't be a layoff in January or February, especially since this is the construction industry. In any event, a new employee (even a Union organizer/employee) can't be charged with knowing that the Employer "is a prosperous company with a growing demand for qualified electricians" as the Employer has asserted in its position statement. Moreover, the work that the Employer might have may be outside of the geographic area desired by the employees. 4 In fact, Medine mentioned to Svetlick that he might be interested in working through the Union if the Employer didn't get any more work down south. Thus, in the words of Technicolor, supra at p. 390, Svetlick's distribution of the "work opportunities" leaflet was not "so disloyal to [the Employer] as to be indefensible."

Similarly, Svetlick's distribution of the "boycott" leaflet at the Hospital was protected. First, Svetlick's distribution was concerted under the Act because Svetlick was engaging in union activity, i.e., as part of the organizing campaign, and therefore he was protected even if he was in fact the only employee involved. Thus under Meyers Industries, Inc., 268 NLRB 493 (1984), union activity is by its very nature concerted and thus protected. There need be no separate showing of concertedness. And of course the Employer "knew" that Svetlick's conduct was union

⁴ We note that Stuart, the Employer's base of operations, is about 90 miles north of Hollywood.

activity when he passed out the first leaflet regarding work opportunities through the Union, almost a week prior to his passing out the "boycott" leaflet.

Moreover, enlistment of third party support as part and parcel of an organizing campaign, as the Union through employee Svetlick did here by distributing the "boycott" leaflet to hospital patrons, is protected activity. Thus the Board in Golden Day Schools, Inc., 236 NLRB 1292 (1978), found protected the distribution of a flyer to parents (the employer's customers), during the course of the Union's organizational campaign, which detailed alleged employer shortcomings regarding its treatment of the day-care students and the manner in which it dealt with its employees. Accord: Kinder-Care Learning Center, Inc., 299 NLRB 1171 (1990).

Further, contrary to the Employer's contention, Svetlick's distribution of the "boycott" leaflet related to a labor dispute, ie. an organizing campaign by the Union, and/or concern over the level of health benefits paid for by the Employer. Section 2(9) of the Act defines "labor dispute" quite broadly and that definition includes "any controversy...concerning the ...representation of persons in...changing, or seeking to arrange terms or conditions of employment...." Thus, Svetlick's organizing activities fall within the definition of "labor dispute." In Beverly Hills Foodland v. UFCW, 39 F.3d 191 (8th Cir. 1994), the court said that the definition of labor dispute under the Act is very broad and that rarely have courts found concerted union activities to fall outside that broad definition. The court said further that when a union acts for some arguably jobrelated reason and not out of pure social or political concerns, a labor dispute exists. Likewise, in Emarco, Inc., 284 NLRB 832, 833 (1987), the Board held that the definition of labor dispute under Section 2(9) of the Act includes "any controversy concerning terms, tenure or conditions of employment."

The Employer's further argument that Svetlick's distribution of the "boycott" leaflet was an act of employee disloyalty, and therefore unprotected, is without merit. The Board law on this point seems to be exemplified by Allied Aviation Service, 248 NLRB 229 (1980), which held that an employee may properly engage in communications with third parties in order to obtain their assistance in circumstances where: 1) the communication is related to a legitimate, ongoing labor dispute between the employees and the employer; and 2) the communication did not constitute a

disparagement or vilification of the employer's product or its reputation. Both of these requirements are met in the instant case. The leaflet clearly did not disparage or vilify the Employer's product or reputation. Further, as noted by the Region, the distribution of the "boycott" leaflet came in the context of an organizing campaign where the Union and the Employer were on opposite sides of that campaign. As the Emarco case teaches, consistent with the Supreme Court's holding in Jefferson Broadcasting, supra, employees may engage in communications with third parties where the communications are related to an ongoing labor dispute and the communications are not so disloyal, reckless, or maliciously untrue to lose the Act's protection. Here, there has been no showing that Svetlick's "boycott" leaflet was untrue, reckless or so disloyal to lose the Act's protection. See also Compuware Corp., 320 NLRB No. 18 (1995).

Accordingly, Svetlick's actions were protected by Section 7 of the Act and therefore an appropriate complaint should issue absent settlement of the charge.

B.J.K.